Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-3 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

SYNERGY GAS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying a petition for a writ of mandamus alleging that the National Labor Relations Board had failed to comply with that court's previous mandate.

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OPINIONS BELOW

The court of appeals' order denying a petition for a writ of mandamus (Pet. App. la) is unpublished, but the decision is noted at 875 F.2d 856 (Table). The National Labor Relations Board's order denying petitioner's request for review (Pet. App. 2a), and the Regional Director's dismissal of the employee decertification petition (Pet. App. 3a-5a) are unreported. The court of appeals' decision enforcing the Board's order in the underlying unfair labor practice proceeding (Pet. App. 8a-9a) is reported at 843 F.2d 1510. The Board's decision and order in that proceeding are reported at 283 N.L.R.B. 656.

JURISDICTION

The order of the court of appeals was entered on April 12, 1989. The petition for a writ of certiorari was filed on July 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In February 1986, the National Labor Relations Board certified Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) as the collective bargaining representative of petitioner's clerical employees at its Patchogue, New York location. Beginning in April 1986, the Union requested that petitioner bargain with it and furnish the names and addresses of employees in the bargaining unit. Petitioner refused to do so, and the Union filed a complaint with the Board. See 283 N.L.R.B. 656 (1987).

The Board rejected petitioner's defenses and ordered it to bargain with the Union and furnish the requested information. 283 N.L.R.B. at 657-658. The Board added that "[t]o ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date [petitioner] begins to bargain in good faith with the Union." *Id.* at 658 (citing *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962); *Commerce Co. d/b/a Lamar Hotel*, 140 N.L.R.B. 226, 229 (1962), enforced, 328 F.2d 600 (5th Cir.), cert. denied, 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 N.L.R.B. 1419, 1421 (1964), enforced, 350 F.2d 57 (10th Cir. 1965)).

Petitioner continued its refusal to bargain, and the Board requested the court of appeals to enforce the Board's order. Petitioner objected, arguing that the court should deny relief because more than four years had elapsed between the election and the Board's certification decision. The court of appeals rejected that argument and enforced

the Board's order (Pet. App. 8a-9a). It relied on its decision, issued the same day, in *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507 (2d Cir.), cert. denied, 109 S. Ct. 81 (1988), adding that "[a]s in *Star Color*, the Board shall give actual notice to the current employees of their right to petition for a decertification election, and our enforcement order will thereupon become effective" (Pet. App. 9a). See *Star Color*, 843 F.2d at 1509-1510.

The Board submitted a proposed judgment that included a Notice to Employees to be posted by petitioner, containing the following language:

> Employees, pursuant to Section 9(c)(l) of the National Labor Relations Act, may petition the National Labor Relations Board for an election to decertify and remove the Union as their bargaining representative. The filing of such a petition can only be done as the voluntary act and choice of the employees and on their own initiative, without coercion, encouragement or assistance from management. All applicable rules, regulations and standards for conducting such an election must be met.

See Pet. App. 13a.

Petitioner moved the court of appeals for "[c]larification as to when a decertification petition should be processed by the Board, if such petition is filed by the employees" (Pet. App. l0a), stating in a supporting affidavit that it was the Board's position that any decertification petition "filed by [petitioner's] employees would not be processed * * * until after a reasonable period for bargaining had elapsed" (*id.* at 13a-14a). In addition, petitioner submitted to the court a proposed judgment requiring that the Board "promptly process" an employee decertification petition. Letter to Clerk, United States Court of Appeals for the Second Circuit, from Peter A. Schneider (Apr. 21, 1988). The court denied petitioner's motion for clarification

(Pet. App. 7a), rejected its proposed judgment, and entered a judgment in the form proposed by the Board. See No. 87-4131 Judgment (2d Cir. Apr. 26, 1988). *

Petitioner began bargaining with the Union sometime between July 15 and August 1, 1988, but then broke off negotiations when an employee filed a decertification petition. Pet. App. 4a. The Board's Regional Director dismissed the petition on September 1, 1988, stating that no question concerning representation could be raised at that time. *Id.* at 3a-4a. The Regional Director noted that there is an irrebuttable presumption of continued majority status for a period of one year following a Board certification. *Id.* at 4a (citing *Brooks* v. *NLRB*, 348 U.S. 96 (1954)). He also explained that where an employer fails to bargain in good faith during the one-year period, the certification year is extended to commence when such good faith bargaining begins or resumes. Pet. App. 4a (citing *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785, 787 (1962)).

The Regional Director further explained that in issuing a bargaining order in this case, the Board had "specifically stated that 'we shall construe the initial period of the certification as beginning the date the [petitioner] begins to bargain in good faith.'" Pet. App. 4a (quoting 283 N.L.R.B. at 658). He recognized that petitioner had begun good faith bargaining no earlier than July 15, 1988, and that, accordingly, the certification period had not expired. Pet. App. 4a. On January 11, 1989, the Board dismissed petitioner's request for review of the Regional Director's decision on the ground that the request raised no substantial issues warranting review. *Id.* at 2a.

Petitioner then sought a writ of mandamus from the court of appeals to compel the Board to process the

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* A copy of the April 21, 1988, letter from Peter A. Schneider and of the court's judgment of April 26, 1988, have been lodged with the Clerk of this Court.

decertification petition and to conduct an immediate decertification election. The court of appeals denied, without opinion, the petition for a writ of mandamus (Pet. App. la). On July 6, 1989, Justice Marshall denied petitioner's application for recall of the court of appeals' mandate (No. A-1062).

ARGUMENT

Petitioner contends that the National Labor Relations Board failed to obey the court of appeals' mandate (Pet. 10-13), that petitioner faces consequent irreparable injury (*id.* at 14-17), and that it therefore "has a clear and indisputable right to the issuance of a writ of mandamus" (*id.* at 18-20). The court of appeals, which is best situated to determine the requirements of its mandate, properly rejected those contentions in a per curiam order denying the petition for writ of mandamus. No further review of that decision is warranted.

This Court has repeatedly recognized that to be entitled to a writ of mandamus, a party must "demonstrate a 'clear abuse of discretion,' *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 * * * (1953), or conduct amounting to 'usurpation of [the judicial] power,' *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 * * * (1945)." *Mallard* v. *United States District Court for the Southern District of Iowa*, 109 S. Ct. 1814, 1822 (1989). "To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek * * * and carry 'the burden of showing that [their] right to the issuance of the writ is "clear and indisputable."'" 109 S. Ct. at 1822 (brackets in original). Petitioner has failed to meet "this demanding standard" (*ibid.*).

The National Labor Relations Board has long held that a certified employee representative is presumed to enjoy continued majority status for a period of one year following certification. See *Brooks* v. *NLRB*, 348 U.S. 96, 98 (1954).

Petitioner contends that the court of appeals' decision requiring petitioner to bargain nevertheless obligated the Board to process a decertification petition from its employees without regard to that longstanding rule. Petitioner seems to concede that the court's decision does not expressly direct the Board to depart from its normal practices; nonetheless, petitioner argues that this direction is "[i]mplicit" in the court's decision (Pet. 12).

Petitioner's interpretation of the court of appeals' mandate is incorrect. In entering its judgment, the court of appeals specifically denied petitioner's motion requesting "clarification" that the Board must process an employee certification petition "without regard to the passage of time" (Pet. App. 7a, 10a-11a). The court also refused to enter petitioner's proposed judgment, which would have required that the Board "promptly process" a petition for decertification. See pp. 3-4, *supra*. Instead, the court approved the Board's proposed judgment, which included a Notice to Employees stating that the "rules, regulations and standards" applicable to decertification elections "must be met" (Pet. App. 13a). Thus, the court of appeals evidently intended that the Board's standard rules, including the one-year presumption of majority status, would apply.

We submit that the court of appeals' intention in this case is clear. But in any event, the court of appeals is best qualified to resolve that controversy. This Court may safely presume that the court of appeals properly understood its own mandate in denying the petitioner's request for a writ of mandamus. Since petitioner has failed to demonstrate that its right to mandamus is clear and indisputable (*Mallard*, 109 S. Ct. at 1822), there is no warrant for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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AUGUST 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00408